MAR 21 2003

Nos. 02-599, 02-954

IN THE

Supreme Court of the United States

SHEILA FOSTER ANTHONY, LISA FOSTER MOODY,
Petitioners

v.

ALLAN J. FAVISH, ET. AL.,
Respondents

OFFICE OF INDEPENDENT COUNSEL,
Petitioner

v.

ALLAN J. FAVISH, ET. AL.,
Respondents

On Petition for Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

FAVISH'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

ALLAN J. FAVISH
Counsel of Record
22406 HOLLY COURT
SANTA CLARITA, CA 91390-4202
(661) 513-2068

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit committed reversible error by holding that Exemption 7(C) of the Freedom of Information Act did not allow the Office of Independent Counsel to withhold four original Polaroid photographs of Deputy White House Counsel Vincent Foster's deceased body.

PARTIES TO THE PROCEEDING

The petitioners are the Office of Independent Counsel, who was the defendant below, and Sheila Foster Anthony and Lisa Foster Moody, who intervened in the district court to prevent release of the photographs. The respondent is Allan J. Favish, who was the plaintiff below, and who has filed his own petition for writ of certiorari in this case, *Allan J. Favish v. OIC, et al.*, No. 02-409.

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FAVISH'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Allan J. Favish filed a lawsuit under the FOIA against Petitioner Office of Independent Counsel ("OIC") to obtain certain original photographs taken in connection with the investigation of the July 20, 1993 death of Deputy White House Counsel Vincent Foster ("Foster"). The OIC withheld photographs of Foster's body taken in Virginia's Fort Marcy Park on the basis of the "personal privacy" exemption in the FOIA, 5 U.S.C. § 552(b)(7)(C).

Later, Petitioners Sheila Foster Anthony and Lisa Foster Moody ("intervenors") intervened in the district court to prevent release of the photographs.

The district court entered its first summary judgment against Favish March 11, 1998, without viewing the original photographs in camera. Intervenors' Appendix., 45.

On July 12, 2000, in deciding the first appeal in this case, the Ninth Circuit reversed and remanded, and ordered the district court to view the photographs in camera. Intervenors' App., 8. Based on its interpretation of the FOIA's "personal privacy" exemption (5 U.S.C. § 552(b)(7)(C)), the Ninth Circuit ordered the district court to balance the "public purpose to be served by disclosure" against the degree to which disclosure would "violate" the "memory of the deceased loved one" held by "a spouse, a parent, a child, a brother or a sister" or constitute an "invasion" of "the survivor's memory of the beloved dead." Intervenors' App., 16. The Ninth Circuit stated: "The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead." Intervenors' App., 16. The Ninth Circuit also stated that the district court was to "balance the effect of their release on the privacy of the

Foster family against the public benefit to be obtained by their release." Intervenors' App., 17.

Applying the Ninth Circuit's interpretation of the "personal privacy" exemption, on January 12, 2001, the district court entered a summary judgment ordering the OIC to release five of the ten disputed photographs and allowing the OIC to withhold the other five. Intervenors' App., 5.

On June 6, 2002, without discussion, the Ninth Circuit affirmed the summary judgment, except that it ordered an additional photograph withheld. Intervenors' App., 1. Contrary to intervenors' statement that the Ninth Circuit did this "[a]fter in camera review of the photographs,"[1] there is nothing in the record establishing that the original photographs were delivered to the Ninth Circuit, only copies.

On August 16, 2002, the Ninth Circuit denied the OIC's and the intervenors' petitions for rehearing and suggestions for rehearing en banc. Intervenors' App., 4.

REASONS FOR DENYING THE WRITS

1. The Intervenors' Arguments Do Not Justify Granting Their Petition.

A. The D.C. Circuit's Use Of An Incorrect Standard Does Not Justify Granting The Intervenors' Petition.

The intervenors state that there are "three issues under the FOIA privacy exemption" raised by the Ninth Circuit's opinion that warrant granting of their petition.[2] The first of these is that the Ninth Circuit and the D.C. Circuit have different standards for evaluating the public interest under Exemption 7(C).[3] The D.C. Circuit stated in *Accuracy in Media v. National Park Service*:

> To show that the invasion of privacy was not "unwarranted," AIM must show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence."[4]

[1] Intervenors' Petition for Writ of Certiorari 6 ("Intervenors' Pet.").
[2] Intervenors' Pet. 6-8.
[3] Intervenors' Pet. 6-7.

That is not the standard in the Ninth Circuit and it is an improper standard. Exemption 7(C) states that disclosure may be denied when it would lead to an "unwarranted" invasion of personal privacy. The exemption does not say anything about having to produce "compelling evidence" in order to make the invasion "warranted" or that it must be evidence of "illegal activity" in order to make the invasion "warranted." This Court has held that the FOIA's exemptions must be narrowly construed to promote the FOIA's purpose of government disclosure.[5]

By imposing the additional burdens of "compelling evidence" and "illegal activity" for those trying to show that the public interest in disclosure of a particular document is paramount to the privacy interest of a single person or a few persons, the D.C. Circuit gave the privacy exemption a broad construction that has no basis in the statutory language or Congressional intent. The D.C. Circuit never explained how its standard is consistent with the FOIA as interpreted by this Court. For example, why require evidence of illegal activity when the public also has an interest in discovering negligent government activity?

The Ninth Circuit did not err by failing to impose the erroneous standard used by the D.C. Circuit in *AIM*. The D.C. Circuit's improper standard was a good reason for this Court to have granted certiorari in *AIM*, but it did not do so. The Ninth Circuit's obedience to the FOIA in this regard does not provide a good reason for this Court to grant the

[4] *AIM*, 194 F.3d 120, 124 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).
[5] *Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board*, 751 F.2d 982, 984 (9th Cir. 1985) (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361, 96 S.Ct. 1592, 1598-99, 48 L.Ed.2d 11 (1976)).

intervenors' petition. The best time to grant certiorari over this issue is when the D.C. Circuit or some other Circuit imposes this erroneous standard again.

Moreover, the intervenors have jumbled cases together that do not use this erroneous standard with those cases that do.[6] Cases holding that a "general interest"[7] in finding the truth, or "mere speculation"[8] or a "broad unsupported statement of possible neglect,"[9] or "merely stating that [a public] interest exists in the abstract,"[10] or "broad unsupported hints of a government coverup"[11] are insufficient, are not the same as cases requiring "compelling evidence" of "illegal activity."

The Ninth Circuit's decision was not based on a general interest in finding the truth or mere speculation or an unsupported statement of possible neglect or anything similar. Rather, the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[12] Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents. Contrary to the intervenors' statement that Favish is "a conspiracy theorist,"[13] compelling evidence was presented to the district court and to the Ninth Circuit establishing that the

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[6] Intervenors' Pet. 9-11.

[7] *See e.g., Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987).

[8] *See e.g., Department of State v. Ray*, 502 U.S. 164, 179 (1991).

[9] *See e.g., KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).

[10] *See e.g., Halloran v. Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989).

[11] *See e.g., Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981).

[12] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[13] Intervenors' Pet. 2.

OIC's reports about Foster's death are untrustworthy and deceptive. The OIC was unable to prove that Favish distorted the evidence and unable to provide plausible answers to the questions raised that would diminish the public's interest in disclosure of the photographs.

B. The Ninth Circuit Required A Nexus Between The Public Interest And The Specific Photographs.

The intervenors state that the Ninth Circuit "fail[ed] to require a nexus between the photographs it ordered released and the alleged public interest . . . ."[14] This is false. The Ninth Circuit ordered the district court to "examine the photos in camera and to balance the effect of their release on the privacy of the Foster family against *the public benefit to be obtained by their release*."[15] The phrase "their release" refers to the subject photographs. Therefore, the Ninth Circuit did not abandon a connection between the subject photographs and their ability to serve the purpose of the FOIA, namely, "to shed light 'on an agency's performance of its statutory duties."[16]

The intervenors then make a factual argument, citing dissenting Judge Pregerson, that "with one exception, the photographs would shed no light on any of the claimed inconsistencies in the Report."[17]

However, the factual issue of what the photographs would reveal about how the OIC performed its job is not a sufficient basis for the intervenors' petition. Supreme Court Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ." Therefore, even if Judges Noonan and

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[14] Intervenors' Pet. 13.

[15] *Favish*, 217 F.3d at 1174 (emphasis added).

[16] *Id.* at 1171 (*quoting United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)).

[17] Intervenors' Pet. 12.

O'Scanlain made an erroneous factual finding about what the photographs reveal, that should not be grounds for granting the intervenors' petition.

Additionally, the intervenors' factual argument is entirely based on Judge Pregerson's dissenting opinion and characterization of the evidence,[18] not the evidence. The intervenors are asking this Court to share its view that Judge Pregerson's dissenting opinion was a factually accurate, fair and logical presentation of the factual issues raised by Favish. In fact, Judge Pregerson's opinion was so deficient that Judge's Noonan and O'Scanlain did not join in it. The intervenors have failed to establish that Judge's Noonan and O'Scanlain made any factual error regarding what the photographs reveal about how the OIC conducted its job.

The intervenors take an unduly crabbed view of the public's interest in seeing the four photographs ordered released. The intervenors made it sound as if the only reason to see the photos is to examine "the location of Mr. Foster's entrance and exit wounds."[19]

In fact, the reason the public needs to see these photos is that the government's presentation of the evidence in its reports is demonstrably untrustworthy and deceptive. The government destroyed its own credibility with regard to this case. The photos may or may not reveal information contradicting the suicide story. The point however, is that the public must be allowed to make that determination for itself in the face of untrustworthy government reports.

The intervenors argue as if there is no relationship between the four photos ordered released and the public's interest in evaluating how the OIC did its job.[20] However, there is such a relationship. Although the Ninth Circuit and the district court did not articulate that relationship, that

[18] Intervenors' Pet. 12-13.
[19] Intervenors' Pet. 12; *see also id.* 13.
[20] Intervenors' Pet. 12-14.

relationship was in the record before both courts, and presumably was taken into account by them.

i. The Leaked Gun-In-Hand Photo.

The district court ordered that the photo entitled "1 – Right hand showing gun & thumb in guard" should be released.[21] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

The original of this photo is important because there is controversy about why the gun would have remained in Foster's hand had he shot himself. Both Fiske and Starr said that the gun remained in his hand because Foster's thumb was trapped and compressed between the trigger and the trigger guard of the gun.[22] The publicly available "leaked" copy of the photo is too degraded to make a definitive evaluation of whether Foster's thumb was extended through the trigger area past the joint on his thumb to cause the gun to stay in his hand. The original of this photo would provide a much better view of his thumb and the trigger area.

Also, common sense tells us that the explosion of supersonic gasses from a .38 high velocity gunshot into the mouth is likely to cause a "blowback" of blood and other organic matter out of the mouth and onto Foster's gun, hand and sleeve. Indeed, Starr quotes Dr. Henry Lee as saying that he examined the photos taken at the park and found "blood spatters" on Foster's hands and shirt.[23] Starr quotes Lee as saying that this "backspatter" is typical.[24] The original photo will allow the public to see if there is any such backspatter.

There also is a question about why the gun appears to be partially lodged under Foster's leg. If he shot himself with that gun while sitting on the ground, how did it get under his leg? The original photo will provide a more detailed view

[21] Excerpts of Record 410 (filed in appeal 2, May 30, 2001) ("ER"). The photo is at ER 178 & 179.
[22] ER 610-611, 616, 620.
[23] ER 616, 621.
[24] ER 616, 621.

and allow a better evaluation of whether the gun is lodged under his leg.

Although the degraded public version of the photo was not officially released, the fact remains that any privacy interest in the original is virtually nil because ABC, Time and Newsweek have given the public version far greater exposure than Favish could ever give any version he might receive.

ii. The Photograph Entitled "5 – VF's body – focusing on the Rt. side shoulder/arm".

The district court ordered that the photo entitled "5 – VF's body – focusing on the Rt. side shoulder/arm" should be released.[25] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that this photo shows "blood stains and/or blood . . . ."[26] This photo also may help solve the mystery about blood flow patterns and an alleged neck wound that officially did not exist.

As Starr stated, paramedic Richard Arthur, "initially said he saw what 'appeared to be a bullet wound, an entrance wound' on the neck."[27] Unstated by Starr is that Arthur testified he was 2-3 feet away from Foster when he observed the apparent bullet neck wound on the right side of Foster's neck, around the jaw line and underneath the right ear.[28] But, citing a nonpublic FBI report, Starr said that Arthur told the FBI in 1996 that autopsy photos Arthur examined were taken from a better angle and a better view than what he had at the park and he may have been mistaken about such a wound.[29]

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[25] ER 409.
[26] ER 482.
[27] ER 277, 314-15.
[28] ER 119-20, 122-23.
[29] ER 277, 314-15.

The alleged neck wound also is discussed in two books by major United States publishers.[30] These books allege a story of illegal conduct by members of the OIC and the FBI in trying to prevent proper enlargement and examination of the pristine original of at least one of the six Polaroid photographs not ordered released.[31] Allegedly, this was done to conceal a neck wound that officially did not exist.[32] The books allege an effort to illegally obstruct the work of Assistant United States Attorney Miquel Rodriguez and his former assistant Lucia Rambusch while they were working on the Foster death investigation at the OIC.[33] One of the authors of the two books, Ambrose Evans-Pritchard, stated in a declaration, "I have seen the photograph showing an apparent neck wound to Foster's neck . . . ."[34]

It is undisputed that one of Starr's experts reported seeing dried blood on Foster's neck in an autopsy photo, supposedly taken after the body was washed, and the location of that dried blood coincided with the location of the alleged neck wound reportedly seen by a paramedic at the park and visible in an enhanced copy of the original photo.[35]

Moreover, Starr discussed blood draining from Foster's "right nostril" and "right side of the mouth."[36] Starr stated

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[30] ER 423-430 (Christopher Ruddy, The Strange Death of Vincent Foster: An Investigation 163-165 (The Free Press, a division of Simon & Schuster, Inc., 1997)); ER 423, 431-453 (Ambrose Evans-Pritchard, The Secret Life of Bill Clinton: The Unreported Stories 135-153 (Regnery Publishing, Inc., 1997)).
[31] *Id.*
[32] *Id.*
[33] *Id.* The district court denied Favish's motion to take the testimony of Rodriguez and Rambusch on the issue of the authenticity of the photos being shown to the district court. ER 209, 220-226, 411-473, 713. The Ninth Circuit was asked to reverse that ruling (Opening Brief of Appellant at 4-6, 46-57 (filed in appeal 2, May 30, 2001), but affirmed it without commenting on the ruling. Intervenors' App. 1.
[34] ER 601, 656, 662.
[35] ER 277, 345.
[36] ER 277, 345.

that many witnesses who saw Foster at the scene described his head as "facing virtually straight, not tilting noticeably to one side or the other."[37] Starr also discussed "a blood transfer stain in the area of the right side of the face" that Dr. Lee allegedly concluded was made when Foster's "head made contact with the right shoulder at some point before the Polaroids were taken,"[38] thereby causing a blood stain to transfer from Foster's shoulder to his cheek. Starr was unable to explain how this happened and could only speculate about who might have moved Foster's head because none of the Park Police or paramedics who were among the first to see Foster's body at the scene stated that they moved Foster's head.[39] Neither Fiske or Starr was able to definitively state how Foster's head made contact with his right shoulder and then returned to a straight-up position to leave the transfer stain on his cheek. Starr implied that the blood on Foster's right shoulder came from the blood draining from the nostril and mouth.[40] Thus Starr implied that the blood draining from the nostril and mouth came first and then stained the shoulder, and then the transfer stain was made on the cheek *over* the blood trail from the nostril and mouth.

However, more recently released evidence from Dr. Lee's report for Starr demonstrates that Starr's implied scenario did not happen. The new evidence raises questions about whether the head was moved more than once and whether the blood on the shoulder initially came from a neck wound, not the mouth, and whether somebody tried to conceal the blood flow from the neck by tilting the head to spill blood from the mouth over the right side of the neck.

According to Lee's report: "A portion of the blood trail from Mr. Foster's mouth appears to have been deposited on

[37] ER 347.
[38] ER 277, 347.
[39] ER 277, 347.
[40] ER 277, 344-347.

top of the transfer pattern after his face was separated from the shoulder region."[41] Starr failed to tell this to the public. Starr led the public to believe that blood drained from Foster's nostril and mouth and stained his shoulder. Then, Starr implies, some unknown person tilted Foster's head so that the right cheek touched the blood on the shoulder and then that person moved Foster's head off the shoulder back to the straight-up position, leaving the transfer stain on the cheek.

Starr did not tell the public that Lee stated that *after* this transfer stain was made, more blood drained from Foster's mouth. How could more blood have drained from Foster's mouth at that point, unless somebody tilted his head again? Presumably his heart had long since stopped beating and at least some of the blood had already drained from his mouth to stain the shoulder.

Starr does not tell us what caused the flow of blood out of Foster's mouth that is described by Lee as going on top of the transfer stain on Foster's cheek. Given Starr's failure to explain this second blood flow, to fit the facts reported by Lee, it appears that one has to assume that the head was moved for a second time. This second movement means that after whomever moved Foster's head the first time, someone (who presumably had no business moving the head of a man known to be dead at a possible crime scene) moved the head with the result that blood streamed down the right side of the head and onto the neck and shoulder. Therefore, we now have possible evidence for a second movement of Foster's head that Starr failed to report.

This leaves the American public in a position of having to make educated guesses with insufficient evidence about what happened. The public should not have to do that. One educated guess is that the shoulder became stained with blood that was draining from a right-side neck wound (that

[41] ER 601, 654-655.

officially did not exist). Then some unknown person moved Foster's head, causing the right cheek to touch the bloodstained right shoulder, thereby creating the transfer stain on the right cheek, and then moved his head back to the straight-up position. Subsequently, somebody moved Foster's head for a second time to the right in order to spill some blood that was collected in the mouth out the right side of the mouth to cover the blood trail that was coming from the neck and make it appear that all the blood was originating from the mouth, and none from the neck.

Such an educated guess is consistent with something else Lee stated that Starr did not tell the public: "A pool of blood appears to be directly under the right side of his neck and shoulder region."[42] Unfortunately, the public is left to this sort of educated guessing because the government has not dealt with the public honestly. We know that Lee told Starr that the contact stain was created before the blood trail from the mouth, implying that they were caused by two separate events. We know that Starr failed to tell this to the public. We also know that neither Lee or Starr offer any explanation of how this happened.

The public must see these photos so that the public can provide the careful analysis that the government failed to provide. Perhaps the photos will show whether the amount of blood that pooled under the right side of the neck and shoulder region, as reported by Lee and concealed by Starr, is too great to have come from the mouth, thus indicating it came from the neck.

We are dealing with a mystery. By nature, we don't know all the answers. We do not know all the right questions to ask. Public release is the only way to ensure that these photos are given the scrutiny they deserve.

iii. The Photograph Entitled "4 – VF's body focusing on right side and arm".

[42] ER 601, 654, 655.

The district court ordered that the photo entitled "4 – VF's body focusing on right side and arm" should be released.[43] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that this photo shows "blood stains and/or blood . . . ."[44] This photo also may help solve the mystery about the blood flow patterns discussed above.

iv. The Photograph Entitled "5 – VF's body – focus on top of head thru heavy foliage".

The district court ordered that the photo entitled "5 – VF's body – focus on top of head thru heavy foliage" should be released.[45] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that in this photo "Foster's face is clearly visible . . . ."[46] This photo also may help solve the mystery about the blood flow patterns discussed above.

C. The Ninth Circuit Did Not Create A New Universal Standard With Its "Graphic, Explicit, etc." Standard.

The intervenors argue that the Ninth Circuit and the district court's use of the phrase "graphic, explicit and extremely upsetting" constitutes a new test for determining whether a privacy interest is impacted, to be applied in all cases.[47] In so doing, the intervenors misconstrue what the Ninth Circuit and the district court did here. The district court stated: "*In this case*, the appellate court appears to have defined the zone of privacy protection as those photographs that are 'graphic, explicit and extremely upsetting.'" Intervenors' App. 5 (emphasis added). Therefore, the zone of

[43] ER 410.
[44] ER 482.
[45] ER 410.
[46] ER 482.
[47] Intervenors' Pet. 14-17.

privacy protection was only defined for "this case" not all cases.

It must be remembered that in "this case" the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[48] Thus, in that context, a photograph would have to meet the "graphic, explicit and extremely upsetting" standard in order to remain hidden from public view. Neither the Ninth Circuit or the district court was establishing that standard for every future case involving a claim of privacy under Exemption 7(C). Therefore, the Ninth Circuit's opinion is not inconsistent with this Court's opinion in *Reporters Committee*, as argued by the intervenors.[49]

Nor does the Ninth Circuit's use of that standard in this case, based on the facts of this case, conflict with other appellate opinions from other circuits. The different result in the D.C. Circuit's *AIM* case is based more on the judge's different analysis of the facts, rather than the Ninth Circuit's use of the "graphic, explicit and extremely upsetting" standard. Accordingly, the Ninth Circuit's use of that standard is insufficient reason for this Court to grant the intervenors' petition.

2. The OIC's Three Arguments About The Ninth Circuit's Evaluation Of The Public Interest Side Of Exemption 7(C) Balancing Do Not Justify Granting The OIC's Petition.

A. The D.C. Circuit's Use Of An Incorrect Standard Does Not Justify Granting The OIC's Petition.

The OIC states that there are "[t]hree aspects of the Ninth Circuit's evaluation of the public interest side of the

[48] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).
[49] Intervenors' Pet. 16.

balance under Exemption 7(C)" that "warrant certiorari."[50] The first of these is that the Ninth Circuit and the D.C. Circuit have different standards for evaluating the public interest under Exemption 7(C).[51] For the same reasons discussed above, the D.C. Circuit's use of an incorrect standard does not justify granting the OIC's petition.

Moreover, the OIC has jumbled cases together that do not use this erroneous standard with those cases that do.[52] Cases holding that a "general interest" in finding the truth is insufficient,[53] or that impugning government reports without "a scintilla of evidence" is insufficient,[54] are not the same as cases requiring "compelling evidence" of "illegal activity."

The Ninth Circuit's decision was not based on a general interest in finding the truth or impugning government reports without a scintilla of evidence. Rather, the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[55] Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents. Contrary to the OIC's implication, this is not a case where "bald allegations of governmental misconduct"[56] were made. The OIC also states that "'speculation' alone cannot be enough under Exemption 7(C) . . . to outweigh the profound privacy interests of third

[50] OIC Pet. 9.
[51] *Id.*
[52] OIC Pet. 9-10.
[53] *See e.g., Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987).
[54] *See e.g., Department of State v. Ray*, 502 U.S. 164, 179 (1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).
[55] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).
[56] OIC Pet. 10.

parties in avoiding disclosure."[57] That would be a good point to make in a FOIA case that involved "speculation alone," but that is not this case.

B. The OIC's False Argument That The Photographs At Issue Reveal Nothing About The Government's Conduct Does Not Justify Granting The OIC's Petition.

The second aspect of the Ninth Circuit's evaluation of the public interest side of the balance under Exemption 7(C) raised by the OIC is that "[t]he photographs at issue here reveal nothing about the government's conduct; they reveal only visual depictions relating to the death of Vincent Foster."[58] The OIC's statement is false. The government conduct at issue is the quality of its investigation into the cause of Foster's death and the accuracy of its conclusion about that death. Photographs of Foster's body will either be consistent or inconsistent with the government's conclusion of suicide in the park. Therefore, the photographs will reveal something about the government's conduct. It is completely illogical for the OIC to state that photographs of a body that has been mysteriously shot reveal nothing about the quality of the investigation into that death. Does the OIC also believe that the photographs were completely irrelevant to the death investigation?

It is especially important in this case that the public see the raw evidence because the government's reports about the death are untrustworthy and deceptive, when compared with the publicly available raw evidence. Because the public cannot trust the government to fairly and accurately characterize the evidence in this case, the public, by definition, must see the evidence for itself.

Moreover, the factual issue of what the photographs reveal is not a sufficient basis for the OIC's petition, as stated in Supreme Court Rule 10. Additionally, the OIC

[57] OIC Pet. 18.
[58] OIC Pet. 14.

makes the same mistake as the intervenors in relying on Judge Pregerson's dissenting opinion and characterization of the evidence,[59] not the evidence.

The OIC supports its argument with a statement that has no relevance to this case. The states: "FOIA, however, does not give the public a generalized 'right to know' personal details about private third parties that happen to be maintained in government files."[60] However, there are no "personal details" or any details about Foster's survivors in these photographs. The only person depicted in the photographs is Foster and because he is deceased, his privacy is not an issue in this case.

The OIC takes an unduly crabbed view of the public's interest in seeing the four photographs ordered released. The OIC made it sound as if the only reason to see the photos is to examine Foster's "head injuries" or "the bullet's path"[61] and the OIC argues that the four photos ordered released have no value to the public.[62] This is false, for the reasons stated above.

C. The OIC's Mischaracterization Of The Ninth Circuit's Opinion Does Not Justify Granting The OIC's Petition.

The third aspect of the Ninth Circuit's evaluation of the public interest side of the balance under Exemption 7(C) raised by the OIC is based on the OIC's mischaracterization of the Ninth Circuit's opinion. The OIC correctly quotes the Ninth Circuit as stating that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations."[63] The Ninth Circuit's statement is

[59] OIC Pet. 11-14.
[60] OIC Pet. 13.
[61] OIC Pet. 14.
[62] OIC Pet. 11-14.
[63] OIC Pet. 15 (quoting *Favish*, 217 F.3d at1173).

completely true and the OIC presents no authority to contradict that statement.

Instead, the OIC mischaracterizes the Ninth Circuit's statement and then attacks the mischaracterization as if it was the Ninth Circuit's holding. The OIC mischaracterizes the Ninth Circuit's statement into the following:

> The court of appeals also erred in holding that the multiple, lengthy investigations that had already taken place and the enormous volume of materials (including photographs about Foster's death already in the public domain were completely irrelevant to evaluation of the public interest in disclosure of the particular photographs at issue here. . . . By giving no weight to the enormous volume of information already released by the government, the Ninth Circuit found the public interest requirement to be satisfied by information the disclosure of which would contribute only marginally, if at all, to public understanding.[64]

Contrary to the OIC's mischaracterization, the Ninth Circuit did not state that the government's reports and publicly available evidence about the death were "completely irrelevant to evaluation of the public interest" in this case. Nor did the Ninth Circuit give "no weight" to those reports and evidence. Rather, after being presented with the deceptions and omissions in the government reports, when compared to the government's own raw publicly available evidence, the Ninth Circuit stated that "Favish, in fact, tenders evidence and argument which, if believed, would

[64] OIC Pet. 15.

justify his doubts" about the government's conclusion of suicide in the park.[65]

Rather than holding the government reports and publicly available evidence irrelevant, the Ninth Circuit found that the reports and evidence were deficient enough to justify its statement that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[66] The OIC fails to disprove the Ninth Circuit's statement.

Moreover, the OIC's argument is based on the following statement:

> In this case, when five investigations in different branches of the federal government (including by the Office of Independent Counsel) have uniformly reached the same result, the contribution to public understanding that a *sixth* investigation by an unsatisfied private citizen can make is marginal at best.[67]

The OIC makes this statement as if the credibility of the government investigations is irrelevant. Under the OIC's view, it is difficult to see why there is any need for the FOIA at all because if the government has conducted several investigations, no matter how untrustworthy, the public has no need to see any of the hidden evidence.

The OIC's view is contrary to the purpose of the FOIA. According to this Court, the central purpose of the FOIA is to give ordinary citizens the power to keep the government

[65] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[66] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[67] OIC Pet. 17.

honest in order to preserve our constitutional democracy.[68] This Court also has held:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.[69]

Consistent with these holdings, the District of Columbia Circuit has discussed the nature of the public interest that could be served by disclosure of government investigative records:

> For example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.[70]

The number of government investigations is not as important as the demonstrable credibility, or lack of credibility, of those investigations. As established below, the government investigations are either not credible or were so limited as to be inappropriate to cite as support for the government's official conclusion.

3. The Fiske And Starr Reports On The Death Are Untrustworthy.

Permeating the OIC's and the intervenors' petitions is the assumption that the majority of the Ninth Circuit panel had no basis for holding that "Favish, in fact, tenders evidence and argument which, if believed, would justify his

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[68] *Department of Justice v. Reporters Committee*, 489 U.S. 749, 772-775, 103 L.Ed.2d 774 (1989).
[69] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L.Ed.2d 159, 178 (1978).
[70] *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984).

doubts" about the government's conclusion of suicide in the park.[71] That assumption is false. The Ninth Circuit majority had good reason to make its statement.

The OIC states that "Favish asserts that he needs the photographs to investigate his allegations of a government-wide conspiracy to cover-up the 'murder' of Foster."[72] The OIC's statement is false. Favish relies upon undisputed facts from the government's own underlying investigative record that do not prove to a certainty either murder or suicide in the park. However, when compared with the reports on the Foster case from Independent Counsels Robert Fiske and Kenneth Starr, those facts establish beyond question that both of those reports are not worthy of the public's trust.

The intervenors state that Favish is a "conspiracy theorist . . . ."[73] No matter how much the intervenors and the OIC argue that it is impossible for such a significant number of government officials and consultants to have produced such deceptive reports, the fact remains that they did, and that is the fundamental truth from which our analysis must begin.[74] The OIC stated: "Having examined, and rejected, all of Favish's specific factual assertions, at best Mr. Favish's assertion of 'public interest' in this case is based upon conspiracy theories and speculation of a mass governmental cover-up relating to Mr. Foster's suicide."[75] Although the OIC may have "rejected" all of Favish's specific factual assertions, it has not refuted them. Contrary to the OIC's statement, Favish's assertion of the public interest is not based exclusively on "conspiracy theories." Such

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[71] *Favish v. OIC*, 217 F.3d 1168, 1173 (9th Cir. 2000).
[72] OIC Pet. 12.
[73] Intervenors' Pet. 2.
[74] It should be noted that it is not necessary for everybody involved in the Foster investigations to have deliberately deceived the public. In addition to those who act deliberately, shoddy work is done by people who are disinterested, lazy, or who are acting reasonably but who have been given incorrect or incomplete information from which to work.
[75] ER 474, 497.

conspiracies remain a possibility, especially because the OIC has failed to explain how the significant distortions and omissions in the Fiske and Starr reports were made.

The OIC states that privacy interests "cannot be trumped by such speculation of government wrongdoing or misconduct."[76] The word "speculation" implies that Favish has not shown any proof that the Fiske and Starr reports are untrustworthy and that there was government misconduct, either intentional or negligent. Contrary to the OIC's statement, the proof of at least negligent misconduct is overwhelming. As to whether any of the misconduct was intentional, there is plenty of circumstantial evidence to take that conclusion beyond the point of mere "speculation."

Moreover, the integrity of the federal court system is at stake because in addition to the public, the OIC misled the special three-judge panel that oversaw its Foster work and to whom Starr's OIC initially delivered its Foster report in 1997.

The Congressional "investigations" involving this death were so limited that they did not investigate the issue of whether Foster was murdered or committed suicide at the park.[77]

Starr failed to tell the public and the three-judge panel that the Park Police and a medical doctor at the death scene reported that they saw no blood spatter on the vegetation in the area that would have been behind Foster's head when he allegedly shot himself.[78]

Starr failed to tell the public and the three-judge panel that the first person officially to see Foster's deceased body and who testified that he did not see any gun in Foster's hand, also testified that the "gun in hand" photo did not depict what he saw.[79]

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[76] ER 474, 497.
[77] ER 602-609, 277, 288.
[78] ER 105, 109, 150, 153.
[79] ER 168-170, 178-179, 277, 358.

Starr and Fiske used an invalid gun identification.[80]

Fiske and Starr failed to tell the public and the three-judge panel that the Park Police Chief made a false statement about alleged identification of the gun.[81]

Fiske and Starr failed to tell the public and the three-judge panel that the medical report by the only doctor to examine Foster at the park reported a neck wound that officially did not exist and certified copies of his report are not the same and appear to have been improperly altered.[82]

Starr falsely implied that the Park Police observed the entire autopsy and Fiske and Starr failed to tell the public and the three-judge panel that before the Park Police arrived, Foster's tongue and soft palate were removed by the autopsy doctor who violated policy by beginning the autopsy before arrival of the police.[83]

Starr failed to tell the public and the three-judge panel that three of the four witnesses who allegedly saw Foster's car in the parking lot during a certain time period after he was dead, reported a car that was a different color than Foster's. Although he accurately reported that the fourth of these witnesses reported seeing a car of a different color than Foster's, Starr concluded that Foster's car was in the parking lot without explaining why all four of these witnesses were mistaken and reported the same color car—one that was a different color than Foster's car.[84]

Starr relied on Dr. Henry Lee's conclusion that Foster's clothes revealed no evidence that Foster's body had been dragged, without telling the public and the three-judge panel that this conclusion was worthless because the Park Police

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[80] ER 89, 92, 147-149, 156, 178-179, 277, 355, 362-363, 474, 488.
[81] ER 151, 152, 155, 156, 158, 474, 492.
[82] ER 44-47, 241-245, 277, 308-09, 311-312, 314-15, 600, 632-635, 643-650.
[83] ER 115, 117-18, 134-35, 154, 277, 309, 345.
[84] ER 57, 89-90, 105, 107-08, 124-26, 128, 130, 137-43, 154, 168, 172, 277, 299, 302, 307, 349, 350, 474, 496.

stated that they dragged Foster's body when it began to slide down the hill during an examination.[85]

Fiske and Starr failed to tell the public and the three-judge panel about an FBI memo to the Director of the FBI, written two days after the death, stating that the shot was fired into Foster's mouth without leaving an exit wound, thereby directly contradicting Starr, Fiske and the official autopsy report.[86]

Starr implied that the reason for the lack of readable x-rays of Foster is that the x-ray machine was not functioning properly. However, Starr failed to tell the public and the three-judge panel that the records show that the first service call for the x-ray machine was made more than *three months after* Foster's death.[87]

CONCLUSION

The intervenors' and the OIC's petitions should be denied.

Respectfully submitted.

ALLAN J. FAVISH
Counsel of Record
22406 HOLLY COURT
SANTA CLARITA, CA 91390-4202
(661) 513-2068

Counsel for Respondent

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[85] ER 105, 109, 111, 146, 277, 332, 377, 474, 489.
[86] ER 277, 311-312, 314, 636-641.
[87] ER 356-57. These records were filed in August 2001 in the case entitled *Accuracy in Media, Inc. v. Office of Independent Counsel*, no. 99CV3448 (ESH) (D.D.C.). The invoices, an excerpt from the *Vaughn* index in that case and an authenticating declaration from AIM's attorney, were attached to Favish's opening brief to the Ninth Circuit in appeal no. 2 as an Addendum.